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Sent via email

November 19, 2016

Shayne Hayes
Pensacola Permits Section
41 N. Jefferson St.
Suite 301
Pensacola, FL 32502

Re: Permit Application No. SAJ-2011-00551 (IP-TEH)
Ridge Road Extension

Dear Shayne Hayes:

I am submitting this comment on behalf of Citizens for Sanity. Please add this comment to the administrative record.

This comment pertains to several parts of the revised Practicability Matrix from 2015.[1] The applicant's reasons for impracticability discussed in this comment include:

1. "Exceeds County's ability to fund"
2. Cost
3. "FDOT owns ROW"
4. "FDOT does not support alternatives greater than 6 general use lanes"
5. "Not an adopted project"
6. "Exceeds 6 general use lane policy"

The US Constitution includes the so-called "Supremacy Clause" in Article VI, which states:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."[2]

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[1] See "Exhibit A-Practicability Matrix-revised-8-10-15.pdf," (Practicability Matrix), Pasco County

[2] See "Exhibit B-Supremacy Clause.docx," [HYPERLINK "http://www.law.cornell.edu/constitution/articlevi"], Date Accessed: January 16, 2015

This means that U.S. law is "supreme" and takes precedence over state laws and policies and by inference takes precedence over local laws, ordinances, and policies. Legal authorities also call this form of precedence the "preemption doctrine."[3]

As you know, the Corps' regulatory mandate, along with other federal agencies, is to uphold and regulate federal environmental laws such as the Clean Water Act (CWA) and the National Environmental Policy Act (NEPA). The Corps must examine alternatives to the preferred alternative and must determine if alternatives are reasonable under NEPA and practicable under the CWA. Therefore, determining practicability is a part of federal law and takes precedence over state and local laws and policies according to the preemption doctrine.

This comment includes an analysis of federal court preemption cases. However, the CWA was not included in their analysis because it did not "produce[] a large enough body of federal court preemption decisions for us to analyze."[4] Since, there are so few CWA preemption cases; does this mean the applicant would have less chance of winning a preemption case if the RRE went to court?

I did find an analysis of a few CWA preemption cases but I am not sure about its application in this situation because they all dealt with pollution or "nuisance law" rather than alternatives analysis procedure.[5]

Courts upheld federal preemption of state or local laws using the Supremacy Clause in much more than half the cases.[6]

The courts show deference to federal agencies when they broach this subject. They state, "In our sample, agencies rarely expressed their opinion on the preemption question. When they did, however, they appear to have swayed the courts."[7]

Surprisingly, they found that state versus local laws had no affect on judge's decisions in the preemption cases analyzed, "when we consider the sample as a whole."[8]

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[3] See [HYPERLINK "http://rwglaw.com/pdf/Dupont-09-11.pdf"], Date Accessed: October 27, 2016, Page 1 of 22

[4] See "Exhibit C-Berkeley-Federal Preemption Jurisprudence-highlighted.pdf," "The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis," David B. Spence and Paula Murray, October 1999, California Law Review at Berkeley Law Scholarship Repository, [HYPERLINK "http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1544&context=californialawreview"], Date Accessed: October 28, 2016, Page 78 of 83, Footnote 292

[5] See "Exhibit D-Preemption of state common law remedies by federal environmental law.pdf," "Preemption of State Common Law Remedies by Federal Environmental Statutes: International Paper Co. v. Ouellette," Randolph L. Hill, September 1987, Berkeley Law Scholarship Repository, [HYPERLINK "http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1313&context=elq"], Date Accessed: November 2, 2016

[6] See "Exhibit C-Berkeley- Federal Preemption Jurisprudence-highlighted.pdf," Table 1, Page 38 of 83; Table 5, Page 45 of 83; discussion on Page 64 of 83

[7] See "Exhibit C-Berkeley- Federal Preemption Jurisprudence-highlighted.pdf," Page 54 of 83

[8] See "Exhibit C-Berkeley- Federal Preemption Jurisprudence-highlighted.pdf," Page 55 of 83

Practicability Issues

We should explore how the applicant's practicability matrix relates to state and local laws; specifically relating them to the items listed on Page 1.

F.S. Section 335.02 states:

> "In determining the number of lanes for any regional corridor or section of highway on the State Highway System to be funded by the department with state or federal funds, the department **shall evaluate all alternatives** and seek to achieve the highest degree of efficient mobility for corridor users. In **conducting the analysis**, the department **must** give consideration to the following factors consistent with sound engineering principles:"[9] Emphasis added.

Table 1 below shows the "factors" that FDOT "must" consider when determining adding lanes to state highways.[10]

Table 1

Factor	Has Factor been considered by County or FDOT?
"(a) Overall economic importance of the corridor as a trade or tourism corridor."	?
"(b) Safety of corridor users, including the importance of the corridor for evacuation purposes."	Yes
"(c) Cost-effectiveness of alternative methods of increasing the mobility of corridor users."	Partly
"(d) Current and projected traffic volumes on the corridor."	Yes
"(e) Multimodal alternatives."	No[11]

[9] See "Exhibit E-FS Section 335.02(3).docx," FS Section 335.02(3), [HYPERLINK "http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0300-0399/0335/Sections/0335.02.html"], Date Accessed: October 27, 2016, Page 2 of 3

[10] See "Exhibit E-FS Section 335.02(3)," FS Section 335.02(3) [HYPERLINK "http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0300-0399/0335/Sections/0335.02.html"], Date Accessed: October 27, 2016, Page 2 of 3

[11] When I say no to these four factors in this table I mean – the applicants never systematically, thoroughly and transparently considered alternatives to the RRE using these factors on the two state roads. They discussed or summarized these issues in writing but there were never any quantitative analyses presented to the Corps, to my knowledge. SR 54 was thoroughly analyzed per se using all these factors, but never as an alternative to the RRE.

"(f) Use of intelligent transportation technology in increasing the efficiency of the corridor."	No
"(g) Compliance with state and federal policies related to clean air, environmental impacts, growth management, livable communities, and energy conservation."	County – In process, FDOT – No
"(h) Addition of special use lanes, such as exclusive truck lanes, high-occupancy-vehicle toll lanes, and exclusive interregional traffic lanes."	No
"(i) Availability and cost of rights-of-way, including associated costs, and the most effective use of existing rights-of-way."	Partly
"(j) Regional economic and transportation objectives, where articulated."	? Yes – for SR 54
"(k) The future land use plan element of local government comprehensive plans, as appropriate, including designated urban infill and redevelopment areas."	Yes
"(l) The traffic circulation element, if applicable, of local government comprehensive plans, including designated transportation corridors and public transportation corridors."	Yes
"(m) The approved metropolitan planning organization's long-range transportation plan, as appropriate."	Yes

In addition, FS 335.02(3) states:

> "This subsection does not preclude a number of lanes in excess of 10 lanes, but an additional factor that must be considered before the department may determine that the number of lanes should be more than 10 is the capacity to accommodate in the future alternative forms of transportation within existing or potential rights-of-way."

At issue here are items "e" through "h," and items "c" and "i" related to cost. The applicant uses FDOT policy as a means to screen out alternatives yet items "e" through "h" have not been considered transparently by the FDOT or Pasco County. In other words, if state roads are considered as alternatives, then FDOT or the applicants "must" consider all these factors in evaluating adding lanes to state roads. And, since the Corps is evaluating these alternatives under federal law, then all these considered factors should be transparent and quantified for the Corps to evaluate.

In other words, the FDOT "must" use all factors above to evaluate adding lanes to state roads and "shall evaluate all alternatives." Since the RRE is an alternative to adding lanes to SR 52 and SR 54 then the applicants "must" use factors "a" through "m" above in their evaluation of these state roads. To do otherwise violates state law.

The RRE has two co-applicants. One of the co-applicants is Florida's Turnpike (Turnpike or FDOT). Their website states: "Florida's Turnpike Enterprise utilizes the best practices of the private sector while operating in the public interest. Operating as a separate business unit of the Florida Department of Transportation (FDOT)…"[12] Therefore, a "unit" of FDOT is a co-applicant with Pasco County for the RRE. Turnpike is responsible for the interchange section of the RRE. Therefore, Pasco County, Turnpike and FDOT must evaluate factors "a" through "m" for all alternatives in a transparent and quantitative manner so the Corps can make an informed decision. To do otherwise violates state law.

Therefore, we respectfully ask that the Corps require Pasco County and FDOT consider every factor above so that a true picture of all alternatives becomes visible. This has broad implication for the alternatives analysis because, as it stands now, the applicant eliminated almost every alternative, besides the 4-lane RRE alternatives, based in part on short opinionative letters from FDOT, with no quantitative analysis.

LRTP

The applicant uses the LRTP to reject alternatives as impracticable. They state in their practicability matrix "Not an adopted project." The title in this row is "Consistent with LRTP?" State and federal law gives Metropolitan Planning Organizations (MPOs) the duties of roadway planning in urbanized areas. State law states, "AUTHORITY AND RESPONSIBITY. – The authority and responsibility of an M.P.O. is to manage a continuing, cooperative, and comprehensive transportation planning process…"[13] This law goes on to state,

> "POWERS, DUTIES, AND RESPONSIBILITIES. The powers, privileges, and authority of an M.P.O. are those specified in this section or incorporated in an interlocal agreement authorized under s. 163.01…It is the intent of this section that each M.P.O. shall be involved in the planning and programming of transportation facilities…**to the extent permitted by state or federal law**."[14] Emphasis added.

How does the MPO relate to the LRTP? This same law states, "Each M.P.O. shall, in cooperation with the department, develop: 1. A long-range transportation plan pursuant to the requirements of subsection (7)."[15] Subsection (7) describes in detail the duties of the MPO in developing a LRTP.

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[12] See "Exhibit F-About Florida's Turnpike.docx," [HYPERLINK "http://www.floridasturnpike.com/about.html"], Date Accessed: November 5, 2016

[13] See "Exhibit G-Florida law re MPO-highlighted.docx," FS 339.175(5) [HYPERLINK "http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0300-0399/0339/Sections/0339.175.html"], Date Accessed: October 30, 2016, Page 9 of 28

[14] See "Exhibit G-Florida law re MPO-highlighted.docx," FS 339.175(6) [HYPERLINK "http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0300-0399/0339/Sections/0339.175.html"], Date Accessed: October 30, 2016, Page 9 of 28

[15] See "Exhibit G-Florida law re MPO-highlighted.docx," FS 339.175(6)(a)1., [HYPERLINK "http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0300-0399/0339/Sections/0339.175.html"], Date Accessed: October 30, 2016, Page 10 of 28

Therefore, the applicant's use of the LRTP to reject alternatives as not practicable is an attempt to preempt federal law with not a state law but with a transportation plan pursuant to state law. Surely, this violates the Supremacy Clause. If the LRTP could be used to eliminate any alternative in pursuit of a preferred alternative, then any county anywhere in the US could simply change their LRTP ahead of an analysis to eliminate alternatives ahead of time. Moreover, the passage above gives MPOs authority only "to the extent permitted by…federal law." Therefore, a LRTP cannot supersede CWA regulations.

However, the applicant states often that the RRE has been in the LRTP for years or decades. This implies that the longer a road is in the LRTP the harder it is to remove or replace. Increasingly, over time the applicant should have considered that the Corps could deny the permit application. They should have made contingency plans for a denial.

Transportation officials plan all roadways, especially major roadways, years if not decades ahead of time. For example, Tower Road itself was originally studied decades ago as part of the "Bi-County Expressway."[16] The County rejected it in the mid 1990s because tolls would not cover bonds.

State law dictates that the transportation planning process should be ongoing as quoted above. It states, "The authority and responsibility of an M.P.O. is to manage a continuing, cooperative, and comprehensive transportation planning process …"[17] Since this process is "continuing" and each subsequent LRTP produced is simply a snapshot of the process at that time, the applicant should continuously plan for alternatives if the RRE permit application is denied.

The quote above states that the planning process should be "cooperative." The applicant states in their response to a CFS comment,

> "FDOT has historically shared the cost of improvements within their right of way for projects that were consistent with the LRTP…However, there is not a precedent we are aware of for FDOT sharing in the cost of improvements to state roads that are not consistent with the LRTP… To assume there would be cost sharing by the FDOT for projects that they do not support would be completely speculative."[18]

Since I show above that the County used the LRTP, which is only a local policy, as a means to preempt federal law, if FDOT uses the same reasoning, then the FDOT is also preempting federal law with a local policy. Therefore, the FDOT cannot legally refuse to fund a road in this case because it clearly violates the Supremacy Clause. If FDOT could legally do this, then any

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[16] See "Exhibit H-Bi-County Expressway-Tower Road.docx," St Petersburg Times, May 3, 2002, Date Accessed: August 17, 2007

[17] See "Exhibit G-Florida law re MPO-highlighted.docx," FS 339.175(5), [HYPERLINK "http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0300-0399/0339/Sections/0339.175.html"], Date Accessed: October 30, 2016, Page 9 of 28

[18] See "Exhibit I-7-13-15 Meeting Responses.pdf," "Responses to the Information Requested at the July 13, 2015 Meeting with USACE," Item # 4, Page 3 of 6

state DOT anywhere in the US could do the same, thereby creating a loophole that would make any roadway alternatives analysis moot.

The law quoted above with regard to "cooperative" is being violated by FDOT, Turnpike and Pasco County by not cooperating fairly in the Alternatives Analysis process as dictated by the Corps. In other words, by using the LRTP to preempt federal law, which is clearly illegal, they are violating state law by not being "cooperative" with the Corps and commenters.

Other Individual Practicability Items

Let us consider other items from Page 1 separately, and in more detail. I may repeat some ideas because these issues are difficult for me to understand.

1. "Exceeds County's ability to fund"

Regardless of the Supremacy Clause, this item violates federal regulations in that the "County's ability to fund" is irrelevant. Two Corps documents state that an applicant's "ability to fund" is irrelevant.[19], [20] Instead, what the Corps should consider is what a typical applicant could practicably fund. Pasco County may be a typical county but then again it might not be. Therefore, Pasco County is violating the Corps regulatory process by only considering what they themselves can afford.

Relevant to the Supremacy Clause, as stated above, Pasco County claims that FDOT will not fund SR 52 or SR 54 because it is not in the LRTP. Since I clearly show local policy cannot preempt federal law, FDOT is also preempting federal law with this reasoning. Therefore, by citing local policy to preempt federal law, FDOT is violating the Supremacy Clause with relation to cost.

The applicant's Practicability Matrix states that the Elevated SR 54 alternative "Exceeds County's ability to fund" even though FDOT, in cooperation with other agencies, has been studying alternatives to this regional roadway and will likely fund it wholly or in part. FDOT will decide on the preferred alternative. Therefore, I do not understand why the FDOT or Turnpike would not pay for expanding SR 54.

The applicants are required by state law to consider "special use lanes," "high-occupancy-vehicle toll lanes," "exclusive interregional traffic lanes," "intelligent transportation technology," and "multimodal alternatives" when considering alternatives to state roads, as stated above. In other parts of this comment, I sometimes lump these various factors into the term "managed" lanes.

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[19] See "Exhibit J-Corps LEDPA Guidance-7-24-14.pdf," Chandler Peter, [HYPERLINK "http://www.swf.usace.army.mil/Portals/47/docs/regulatory/Hot%20Topics/2014%20Jul%20Alternatives.pdf"], Date Accessed: November 10, 2016, Page 13 of 15

[20] See "Exhibit K-SAJ Alternatives Analysis Presentation.pdf," USACE Jacksonville District, [HYPERLINK "http://www.saj.usace.army.mil/Portals/44/docs/regulatory/News/4_Alternatives%20Analysis.pdf"], Date Accessed: October 19, 2016, Pages 24 and 25 of 44

As discussed above, a "business unit" of FDOT is a co-applicant with Pasco County for the RRE. FDOT must consider managed lanes on all State Road alternatives, according to state law, and costs associated with FDOT paying for State Road alternatives.[21] Pasco County cannot presume that FDOT will not pay for improvements to State Roads because state law requires that FDOT "evaluate all alternatives" and consider all "factors" including cost when applying this state law. FDOT's consideration of these factors should be detailed, transparent, and available to the Corps for review.

Therefore, FDOT's acceptance of paying for the RRE interchange and then refusal to pay for expansion of SR 52 or SR 54 is arbitrary, preempts the US Constitution and violates federal law. In other words, favoring one alternative by paying for the RRE interchange, and disadvantaging other alternatives by not agreeing to pay for them, violates Corps regulations and state law. Putting it another way, what the applicants are saying is that, pursuant to federal regulations, FDOT has the right to preempt those same federal regulations by refusing to pay for alternatives they do not prefer.

2. "FDOT owns ROW" under the category of "Available for acquisition?"

If the County conducts an alternatives analysis pursuant to Corps regulations, then FDOT must also abide by Corps regulations. FDOT cannot refuse to make this ROW available because this would mean a DOT land use decision could preempt alternatives analysis regulations anywhere in the US thus making any roadway alternatives analysis moot. It is not that Pasco County wants to purchase FDOT ROW, it is that FDOT and Pasco County are colluding to thwart federal law by making land unavailable. The reasons given for this have to do with other items on the applicant's practicability matrix. The applicants base these land use decisions on local policy and not on any State law. Therefore, it is clear that FDOT is violating the Supremacy Clause when they refuse to make ROW available for an alternative.

3. "FDOT does not support alternatives greater than 6 general use lanes" under the row title of "Likely to receive FDOT permit?"

This reason for impracticability is clearly not in State law. As quoted above, State law states "This subsection does not preclude a number of lanes in excess of 10 lanes…" Several comments from Citizens for Sanity show that state roads with more than 6-general-use-lanes exist in the Tampa Bay area. Another comment shows that there are numerous State Roads in Florida with more than 6-general-use-lanes. A long section of US 19 (SR 55) in northern Pinellas County has 8-general-use-lanes. An FDOT policy or opinion of "does not support" or not "likely to receive FDOT permit" clearly should not preempt a federal regulatory requirement. Therefore, use of this reason to claim an alternative is not practicable clearly violates the Supremacy Clause.

As stated previously, State law requires that the applicants consider managed lanes on state roads. The applicants should consider these alternatives in the same way as adding general use lanes with detailed quantitative analysis that is transparent to the Corps. Once FDOT has considered all alternatives to any particular state road, as accorded by State law, they can choose

[21] See "Exhibit E-FS Section 335.02(3).docx," F.S. 335.02(3)(c) and (i), or Table 1 above

either managed or general use lanes as the preferred alternative. Whatever alternative FDOT prefers, they must abide by the Corps decisions regarding practicability. Therefore, given FDOT must consider both managed lanes and general use lanes on SRs, the Corps should not let the applicants preclude a SR completely as an alternative just because FDOT does "not support" more "than 6 general use lanes."

As explained by Pasco County, the future SR 54 is expanded in the LRTP even with a 4-lane RRE. If Pasco County and FDOT determine, for example, that SR 54 will eventually need 10 lanes even with a 4-lane RRE, then adding 2 or 4 lanes to 10 lanes would equal 12 and 14 lanes respectively, as an alternative. As shown above, State law "does not preclude a number of lanes in excess of 10 lanes." I doubt if it would ever come to this because FDOT would probably create some other solution to a 12 or 14-lane SR 54, such as mass transit. Therefore, state law provides for enough lanes to accommodate any future travel demand on this road, even without the RRE.

4. "Exceeds 6 general use lane policy" under the row heading of "Consistent with LRTP?"

As with the LRTP section above, this "policy" is just that, a local policy and should not preempt federal regulatory law. Therefore, this reason for eliminating alternatives as not practicable violates the Supremacy Clause of the Constitution.

The applicant never truly considered managed lanes on SRs 52 and 54 as RRE alternatives and thus created a "catch 22."

The applicants use circular reasoning that goes something like this:

1. Managed lanes are too expensive or logistically impossible for Pasco County so we are only considering adding general use lanes.
2. FDOT and County policies do not support more than six general use lanes in a divided roadway.
3. Therefore, SR 52 and SR 54 are not practicable.

I hope the Corps can see the applicant's reasoning unfairly precludes SRs 52 and 54 not only in the practicability matrix, but also in the cost analysis by giving FDOT bogus reasons for not paying for expanding the two state roads.

Sincerely,

Richard Sommerville

cc: Ron Miedema, EPA